No. 402.

POSTAL TELEGRAPH-CABLE COMPANY,
APPELLANT,
v.
TONOPAH AND TIDEWATER RAILROAD COMPANY.

No. 403.

THE WESTERN UNION TELEGRAPH COMPANY,
APPELLANT,
v.
THE BALTIMORE & OHIO RAILROAD COMPANY.

No. 404.

POSTAL TELEGRAPH-CABLE COMPANY,
APPELLANT,
v.
CHICAGO GREAT WESTERN RAILROAD.

BRIEF OF COUNSEL FOR THE INTERSTATE COMMERCE COMMISSION AS AMICUS CURIÆ.

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OCTOBER TERM, 1918.

POSTAL TELEGRAPH-CABLE COMPANY, plaintiff in error, *v.* TONOPAH AND TIDEWATER RAILROAD Company.	No. 130.
THE WESTERN UNION TELEGRAPH COMPANY, appellant, *v.* THE BALTIMORE & OHIO RAILROAD Company.	No. 217.
POSTAL TELEGRAPH-CABLE COMPANY, appellant, *v.* CHICAGO GREAT WESTERN RAILROAD.	No. 404.

BRIEF OF COUNSEL FOR THE INTERSTATE COMMERCE COMMISSION AS AMICUS CURIAE.

STATEMENT OF THE CASE.

By order of this court these three cases are to be heard together. The principal question involved is whether railroad and telegraph companies subject to

the act to regulate commerce may, under contract, perform public or "off line" interstate transportation or transmission services for each other free or for less than the regular rates charged other shippers or senders of messages for like services. This calls for a construction of a proviso in the act of June 18, 1910 (36 Stat. L. 539, 546, c. 309, sec. 7), which reads:

> That nothing in this act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers for the exchange of services.

The procedure in these cases differs and the operative contracts between the rail and telegraph companies are not alike in all respects, but the facts, material to a determination of the issues raised, are the same in each case. The respective contracts are set forth in the transcript of record of each case and provide in detail for the construction, maintenance, and operation of the telegraph lines upon the rights of way of the railroad companies. In the matter of construction the telegraph companies generally furnish the material and skilled labor and the railroad companies furnish the unskilled labor and right of way, and transport the laborers and material to and from points on their lines where they are needed. One or more of the wires is or are devoted exclusively to the railroad in operating its lines, with the right to the use of other wires when required; the telegraph company is then free to use its wires for commercial or public messages. The railroad company

furnishes the offices for the telegraph operators and in some cases the station agent is the telegraph operator. In some other respects, there is an exchange of services. A brief statement of each case will aid in presenting the controversy and the rulings of the courts below.

1. *The Postal Telegraph-Cable Company* v. *The Tonopah and Tidewater Railroad Company*, No. 130, is an action at law brought by the telegraph company in the Municipal Court of the State of New York to recover $7.32 charges for the transmission of interstate telegrams at the instance of the railroad company. The defendant sets up as a defense an agreement for free transmission in the operating contract between the companies. Without reviewing the evidence pertaining to the making of this contract and the manner in which it became operative between these companies, we quote the seventh article in the agreement as amended (printed record, p. 76):

> VII. The telegraph company agrees to transmit free over its lines beyond said railway telegraph lines, business of the railway company to the extent of twelve dollars ($12) per mile of railway per annum, including any extensions that may hereafter be made of said railway, such business being charged at the regular day rates of the telegraph company from the point where any such message originates to the final destination, all such railway messages in the telegraph company's possession to be regarded as handled by them

> from point of origin to destination, and for this purpose the telegraph company will issue to such officers of the railway company as may be designated by the president, vice president, or general manager thereof, annual franks of the telegraph company, authorizing such free transmission of messages relating strictly to the railway or corporate business of the railway company originating at or destined to points on the telegraph company's line within the United States, either upon or off the line of said railway; and in case the telegraph business of the railway company beyond its lines shall amount to more than twelve dollars ($12) per mile of railway per annum, the excess shall be paid for at one half the regular rates of the telegraph company. It is understood and agreed, however, that the telegraph service herein provided for applies only to the transmission of messages concerning business of the railway company, and shall not be extended to messages for transmission by ocean cable, nor to messages ordering sleeping car, parlor car, or steamer berths, or other accommodations for customers of the railway company, the tolls upon which should properly be chargeable to such customers.

The original contract is dated December 26, 1888, and is to "continue for ninety-nine years" from its date.

The plaintiff introduced certain rulings of the Interstate Commerce Commission, which are set forth in the printed record at page 59 et seq. These rulings were made before the amendatory act of 1910 and

deal with the rights and duties of railroad companies subject to the act to regulate commerce. The Commission held:

> But the Commission is of the opinion that so much of any such contract between a telegraph company and a carrier as stipulates or contemplates that such carrier will furnish free or reduced-rate carriage and transportation to the officials, employees, laborers, materials, or supplies of such telegraph company, in connection with the construction, maintenance, and operation of a telegraph line and service off the lines of such carrier and on the lines or system of lines of any other carrier, and for the use and service of such other carrier or for such telegraph company, is unlawful under the terms of the act to regulate commerce. In our opinion no railroad or system of railroads can lawfully stipulate or contract with a telegraph company for the carriage of its officials, employees, or property for any greater or less or different consideration than that specified in the regularly published tariffs in effect at the time, except in connection with the construction, operation, and maintenance of a telegraph service on its own lines or system of lines. (Id. 62.)

Judge Lynn, of the Municipal Court of New York, gave the only written opinion in the case. It is found on page 40 of the printed record and reads as follows:

> This case, although involving only a small sum of money, involves a very important question of law. There is no conflict as to

> the facts, and hence that question of law stands out clear and distinct. It is whether the interstate commerce act of Congress, as construed by the Interstate Commerce Commission in its ruling of March 28, 1916, is constitutional under the Constitution of the United States, as applied to the contract in evidence in this case, between the plaintiff and defendant, made prior to the act of Congress of June 18, 1910, which placed telegraph companies within the interstate commerce act. In other words, could an act of Congress constitutionally abrogate the so-called free telegraph service to be given by the plaintiff to defendant under the terms of that contract? I think that the contract is a bar to recovery in this suit, and that that provision of the interstate commerce act as construed by the Interstate Commerce Commission, which prevents the rendering of the so-called free telegraph service by plaintiff to defendant in accordance with such contract, is unconstitutional and accordingly I direct judgment for the defendant.

The case was appealed to the Supreme Court of New York and at a hearing of appeals from the Municipal Court the judgment was affirmed and a further appeal was taken to the Appellate Division of the Supreme Court, First Department, where the decision of the Municipal Court was again affirmed. The case comes here on writ of error.

The errors assigned, set forth on pages 50 and 51 of the record, call for a construction of the proviso

in the act of June 18, 1910, and question the constitutionality of the act if the ruling of the Interstate Commerce Commission be sustained.

2. *The Western Union Telegraph Company* v. *The Baltimore & Ohio Railroad Company*, No. 217, is a suit in equity brought by the railroad company in the United States District Court for the Southern District of New York. There is attached to the bill as Exhibit A the operating contract between the railroad and the telegraph company dated October 15, 1887, to continue in force for a term of 50 years from its date. The tenth and eleventh articles of the contract read as follows (printed record, p. 29):

> Tenth. The telegraph company shall receive and transmit over the said lines along said railroads, in the order in which they and other messages shall be filed with it, and shall deliver, with promptness and dispatch, and free of charge, the messages of the officers and agents of the railroad company, pertaining to its railroad business between all cities, towns, and places now reached by said telegraph lines on said railroads.
>
> And it is expressly agreed that such messages shall be received at and delivered from any of the offices of the telegraph company or its subordinate companies in any of the said cities, towns, and places, and when so received shall be transmitted by the telegraph company, over said telegraph lines free of charge. And if the same for any reason of convenience

to the telegraph company shall be transmitted by other lines to the place of destination, no charge shall be made therefor.

The telegraph company agrees to issue to such officers of the railroad company, as may be designated by the president or other authorized officer thereof, annual franks authorizing the free transmission of messages relating strictly to the railroad business of the railroad company's railroads covered by this agreement, originating at and destined to points on the lines now or hereafter owned or operated by the telegraph company, or its subordinate companies, in the telegraph company's general telegraph system, beyond or off the line of said railroads to an amount not exceeding ten thousand dollars ($10,000.00) per annum, calculated at the regular commercial day rates of the telegraph company between the points at which such messages originate and the points to which they may be destined. And the railroad company agrees to pay to the telegraph company one-half of its aforesaid rates on all such messages in excess of said amount. Settlements to be made yearly.

It is understood and agreed that the free telegraphic service herein provided for applies only to the transmission of messages concerning the operation and business of the railroad company's railroads covered by this agreement, andshall not be extended to any messages for transmission by cable, nor to messages ordering steamer berths, merchandise, or accomodation for customers of the railroad company,

the tolls on which messages should properly be chargeable to such customers.

Eleventh. The railroad company agrees to transport, free of charge over its said railroads, on application of the superintendent or other proper officer of the telegraph company, all employees of the telegraph company when traveling on its business or engaged in its work along said railroads; and to likewise transport and distribute free of charge, all poles and other material and supplies of the telegraph company, for the construction, maintenance, renewal and reconstruction of the said telegraph lines named on Schedule B along said railroads, and of such additional wires as may be erected on said telegraph lines, and of the lines and wires hereinafter provided for, on extensions, branches, and acquired roads, and also material and supplies for the establishment, maintenance, and operation of the officers of both parties hereto upon said telegraph lines at places along said railroads.

And the railroad company also agrees to transport, free of charge, the employees of the telegraph company when traveling on its business, or engaged in its work, and the poles and other material and supplies of the telegraph company, required for the construction, maintenance, renewals, and reconstruction of other telegraph lines of the telegraph company than those hereinbefore named whether on or off the line of said railroads, to an amount not exceeding ten thousand ($10,000.00) per annum, calculated at the

> current transportation rates of the railroad company; and the telegraph company agrees to pay to the railroad company one-half of its aforesaid rates on all such transportation of employees and poles and other material in excess of said amount. Settlements to be made yearly.

The bill sets forth the rulings of the Interstate Commerce Commission, with other alleged facts, and compliance with the rulings by the Western Union Telegraph Company. The bill prays that the—

> court will determine, adjudge, and decree that said contract, "Exhibit A," is lawful and binding on the parties thereto and is still in force and effect notwithstanding the conference ruling of March 18, 1916, of said Interstate Commerce Commission and notwithstanding the action of the defendant in respect of such contract or in asserted compliance with such ruling.

It further prays for specific performance of the contract and for an injunction.

The Western Union Telegraph Company filed an answer admitting the allegations of the bill. After hearing by the court a decree was entered on February 28, 1917, granting the prayers of the bill. A written opinion was filed by Mayer, district judge. (Printed record, p. 38 et seq.) An appeal was taken by the telegraph company to the United States Circuit Court of Appeals for the Second Circuit where the decree was affirmed and the case was appealed to this court.

It should be noted in connection with these appeals that the brief filed in this court by counsel for the Western Union Telegraph Company on page 13 states:

> The telegraph company is therefore here formally assigning error in the decree, but desires the court should understand that it believes, as it has constantly insisted, that the decree below was right, but has brought the matter into this court, in pursuance of its understanding with the District Court, in order that the Interstate Commerce Commission may have an opportunity to be heard through its counsel in support of its ruling.

In this case, as is disclosed by the brief of appellant's counsel, there is no party to the record upholding the ruling of the Interstate Commerce Commission. The briefs filed by both appellant and appellee are in support of the decree entered in the District Court.

The errors assigned in this case are found on pages 60 and 61 of the printed record and call for a construction of the proviso in Section I and its application to the provisions of articles 10 and 11 in the contract between the parties.

3. *The Postal Telegraph-Cable Company* v. *Chicago Great Western Railroad*, No 404, is a bill in equity filed in the District Court of the United States for the Northern District of Illinois, Eastern Division. The bill seeks to compel the telegraph company to comply with the terms of a certain contract made December 26, 1888, between the defendant and plaintiff's predecessor and to restrain the prosecution

of certain actions at law instituted by the telegraph company to collect moneys due for services in transmitting interstate telegrams, this contract to continue for ninety-nine years from its date.

The seventh article of the contract reads in part as follows (printed record, p. 86):

> VII. The telegraph company agrees to transmit free over its lines beyond said railway telegraph lines business of the railway company to the extent of $10.— per mile of railway per annum, including any extensions that may hereafter be made of said railway, such business being charged at the regular rates of the telegraph company, and for this purpose the telegraph company will issue to said officers of the railway company as may be designated by the president, vice president, or general manager thereof, annual franks of the telegraph company, authorizing such free transmission of messages relating strictly to the railway or corporate business of the railway company, originating at or destined to points on the telegraph company's line within the United States, either upon or off the line of said railway; and in case the telegraph business of the railway company beyond its lines shall amount to more than $10— per mile of railway per annum the excess shall be paid for at one-half the regular rates of the telegraph company * * * .

The rulings of the Interstate Commerce Commission are set forth and compliance therewith by the telegraph company.

The District Court sustained the rulings of the Commission in an opinion rendered by Evans, acting district judge, and a decree was entered dismissing the bill. (Printed record, p. 84, et seq.) An appeal was taken by the railroad company in the United States Circuit Court of Appeals for the Seventh Circuit where the decree of the District Court was reversed, opinion by Baker, circuit judge. (Printed record, p. 108, et seq.) From this decision an appeal was taken to this court. The errors assigned in this case present the same question as is presented in the preceding case.

ARGUMENT.

The material facts being admitted, we shall discuss the questions of law involved in these cases under three heads:

First. Does the proviso authorizing "contracts * * * for the exchange of services" permit the companies to disregard those provisions of the act to regulate commerce which require the application of reasonable rates for public services, and prohibit unjust discrimination and undue or unreasonable preferences or prejudices?

Second. If the proviso is limited to those services on the line which in their nature are private, is the act unconstitutional?

Third. Does the proviso in the antipass paragraph of section 1 of the act to regulate commerce, permitting the exchange of passes and franks, affect the construction given to the proviso authorizing contracts for the exchange of services?

I.

Does the proviso authorizing "contracts * * * for the exchange of services" permit the companies to disregard those provisions of the act to regulate commerce which require the application of reasonable rates for public services, and prohibit unjust discrimination and undue or unreasonable preferences or prejudices?

Section 1 of the act to regulate commerce as amended by the act of June 18, 1910, provides:

> * * * That the provisions of this Act shall apply to * * * telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one State, Territory, or District of the United States, to any other State, Territory, or District of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this act * * *.

The requirements that all rates shall be just and reasonable, and that no undue or unreasonable preferences or advantages be given by the carriers apply to all carriers subject to the act. In passing upon the application of the provisions of the Act to water carriers this court in *Interstate Commerce Commission* v. *Goodrich Transit Company* (224 U. S. 194, 207), speaking through Mr. Justice Day, said:

> Such common carriers are declared to be subject to the provisions of the act in precisely the same terms as those which comprehend the other companies named in the act * * *. It may be that certain provisions of the act

> are in their nature applicable to some carriers and not to others; * * *.

This language applies with equal force to the telegraph, telephone, and cable companies brought under the act by the amendment of 1910 and justifies the ruling of the Commission, hereafter quoted, that the telegraph and telephone companies are subject to the provisions of sections 1, 3, 15, and 20 of the act to regulate commerce although other provisions of the act are not applicable to such companies.

Telegraph, telephone, and cable lines are essential instrumentalities in the operation of modern railroads. They are necessary for the transmission of orders, giving information as to track and other conditions, the movement of trains, quick communication between operating officers and employees, and general administration. Cables are required in many instances in this country where the rail line is broken by waterways and where overhead wires are impossible or impracticable. Railroad companies may construct their own telegraph lines for use in the operation of their railroad or they may, as is usually done, arrange with existing telegraph companies to construct and operate lines along their rights of way, giving the railroad companies telegraph service. Speaking upon the relation between railroad and telegraph companies this court in *United States* v. *Erie Railroad* (235 U. S. 513, 520), speaking through Mr. Justice McKenna, said:

> It will be observed that while the companies in many respects are independent, they are

> also, in some respects at least, dependent. The telegraph is a facility of the railroad company and necessary to its operations, the telegraph company doing what the railroad company did for itself before the agreement and but for the agreement with the telegraph company, would have to do.

Because of this relation an exchange of services is necessary and proper to a certain extent.

There are two classes of work performed by common carriers:

First. Private carriage or transmission in constructing, repairing, and operating their properties. This involves the carriage of persons and property by the railroad companies and the transmission of messages by the telegraph companies, but it is not a public service by a common carrier. This is clearly stated in *Santa Fe Railway* v. *Grant Bros.* (228 U. S. 177, 186, 187), where this court, speaking through Mr. Justice Hughes, said:

> In constructing, improving or repairing its road, and in building its extensions and branches, the railroad company is providing facilities for its service as a common carrier, but of course is not acting as such. It may do the work itself, if it chooses, or it may make it the subject of contract with another. In the latter case it simply employs an appropriate agency. The haulage by the railroad company of the men, appliances and supplies, required by the contractor for the purpose of the construction or improvement, to or from

> the point on its line where the work is to be done, is merely incidental to the work itself. The cost of such haulage is obviously an item of expense which must be taken into account in fixing the terms of the construction contract, and in providing for it over its own line the railroad company may adjust the matter with the contractor as it sees fit. If the railroad company did the work directly it would have to take its employees and the necessary outfit to the place of work, and it may undertake to do the like for the contractor, either free of charge or at reduced rates, as they may agree.

Considering the relation between a railroad and a telegraph line, the existing contracts under consideration in so far as they provide for "on line" free service or the exchange of services in the construction, maintenance, and operation of the railroad and the telegraph line, to the extent that the telegraph line is coterminous with the railroad, are unobjectionable. The Commission therefore held in conference rule 491, as it had stated in former rules—

> that such carriers may so contract, without reference to said lawful rates and charges, for the transportation of the property of the telegraph company over the line of the contracting railroad company for use along the latter's line and in the construction, improvement, or operation thereof; that is to say, when such transportation is not conducted by said railroad as a common carrier.

This also applies to the transmission of messages on the line by the telegraph company in connection with the construction, maintenance, and operation of the railroad. The proviso under consideration permitting contracts for the exchange of services has full operation in this large field of private service.

Second. Public carriage of persons and property and the transmission of messages for the public. The Government regulates this service by requiring reasonable and uniform charges, and prohibits favoritism, unjust discrimination and undue or unreasonable preferences. As to these public or commercial services, where the companies act as common carriers, we contend that the proviso, permitting contracts for the exchange of services, is inoperative, except it may permit the offsetting of accounts at settlement periods, the balances only being paid in money.

STATUTORY PROVISIONS.

The provisions of the act to regulate commerce as amended which dominate the carriers and all other provisions of the act are the following:

Section 1:

> All charges made for any service rendered or to be rendered in the transportation of passengers or property and for the transmission of messages by telegraph, telephone, or cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: * * *.

Section 3:

> That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 15:

> That whenever, * * *, the Commission shall be of opinion that any * * * rates or charges whatsoever demanded, charged, or collected by any common carrier or carriers subject to the provisions of this act for the transportation of persons or property or for the transmission of messages by telegraph or telephone as defined in the first section of this act, or that any individual or joint classifications, regulations, or practices whatsoever of such carrier or carriers subject to the provisions of this act are unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this act, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be

charged, and what individual or joint classification, regulation, or practice is just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds the same to exist, * * *.

Section 6, applying to the railroads, provides for the filing, printing, and posting of schedules of rates, fares, and charges, and prohibits the charging, demanding, collecting, or receiving a greater or less or different compensation than the published rate. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this act.

ADMINISTRATIVE RULINGS.

These rulings cover two periods: (1) From the adoption of the Hepburn Act, June 29, 1906, to the amendment of June 18, 1910, and (2) the period subsequent to the amendment of 1910. During the first period only the railroads were subject to the act and the regulatory power of the Commission. The regulations adopted in 1907, therefore, were made in reference to the conditions then existing. These conference rulings are duly published by order of the Commission and the references are to Conference Rulings Bulletin No. 7, issued August 1, 1917.

June 3, 1907.

219. TRANSPORTATION OF MEN OR PROPERTY FOR TELEGRAPH COMPANIES.—(*a*) In its decision on the petition of the Western

Union and Postal Telegraph Companies, in *Railroad-Telegraph Contracts*, 12 I. C. C. 10, the Commission held it would be unlawful for a carrier subject to the act to contract or stipulate with a telegraph company for the carriage of its officials, employees, or property for any greater or less or different compensation than that specified in the regularly published tariffs in effect at the time, except in connection with the construction, operation, and maintenance of telegraph line and service on its own line. It was held that a group of separately incorporated roads, recognized as a "railway system," may be considered as one in the making of contracts for telegraph service on that system. (Modified by ruling 491. See also rulings 95a, par. 2, 161, and 364; see also amendatory act of June 18, 1910, interpreted in ruling 305.)

(*b*) This definitely differentiates between the employees of the telegraph company who are actually engaged in constructing and maintaining a telegraph line along the line of a railway, or in operating such telegraph line as a part of the actual operation of that railway, and those who are engaged in the commercial business of the telegraph company. The fact that railway officials may, by use of deadhead franks, send messages on railway business from or receive such messages at a commercial office of a telegraph company does not constitute that office a part of the operation of any of the lines of railway which such officials represent nor bring that telegraph office into such relation-

ship with the business of the railways as to warrant treating it as a part of the operating facilities of such railways. Practically all telegraphing so done is "off the line" business and is to be considered as commercial business. The same distinction is to be observed in the hauling of materials and supplies for telegraph companies with which the railway company has contract for telegraphic service. (Amended by ruling 491. See also ruling 305.)

The pertinent parts of rule 305 hold:

March 13, 1911.

305. APPLICATION OF THE AMENDED ACT TO TELEGRAPH AND TELEPHONE COMPANIES.—(*a*) Each and every telegraph and telephone company which transmits messages over its line or lines from a point in one State, Territory, or District of the United States to any other State, Territory, or District of the United States, or to any foreign country, is subject to the provisions of the act.

* * * * *

(*d*) It follows that telegraph and telephone companies subject to the act, as above indicated, must conform to the provisions of section 1 thereof, requiring that all of their rates and charges for the transmission of interstate messages shall be reasonable and just, and that such companies may lawfully issue franks covering free interstate service or may grant free interstate service to the same extent, and subject to the same limitations as other common carriers under the

provisions of said section. (See rulings 95a, par. 2, 161, 219, and 364.)

(*e*) Such telegraph and telephone companies subject to the act are also governed by the provisions of section 3 forbidding any undue or unreasonable preference or advantage by rebates or otherwise, or any undue or unreasonable prejudice or disadvantage in any respect whatsoever, and are subject to the lawful orders of the Commission made pursuant to the provisions of section 15 of the act, and also of section 20 thereof respecting the keeping of accounts and memoranda and the making of reports to the Commission.

March 23, 1916.

491. EXCHANGE OF SERVICES UNDER CONTRACTS BETWEEN RAILROADS AND TELEGRAPH, TELEPHONE, OR CABLE COMPANIES.—Upon inquiry whether under section 1 of the act a railroad may contract with a telegraph company to transport the latter's property, either for use on the railroad's line or elsewhere, at a rate different to the regularly published rate for such transportation: *Held*, That such an exchange of services may lawfully be made only upon the basis of the legally established rates of the railroad and on the basis of the fixed charges of the telegraph company regularly exacted of other customers for similar services; except that such carriers may so contract, without reference to said lawful rates and charges, for the transportation of the property of the telegraph company over the line of the contract-

> ing railroad company for use along the latter's line and in the construction, improvement, or operation thereof; that is to say, when such transportation is not conducted by said railroad as a common carrier. (Amends and modifies ruling 219 and cancels ruling 364; see also ruling 305.)

A contemporaneous construction of a statute by those upon whom is imposed the duty of administering it is entitled to weight, and, unless clearly wrong, to determining weight. (*United States* v. *Erie Railroad*, 236 U. S. 259, 270; *New Haven case*, 200 U. S. 361, 401; *United States* v. *Hermanos*, 209 U. S. 337, 339; *United States* v. *Philbrick*, 120 U. S. 52, 59; *Illinois Central R. R.* v. *I. C. C.*, 206 U. S. 441; *United States* v. *Moore*, 95 U. S. 760.)

STATUTORY CONSTRUCTION.

Coming now to the construction of the proviso in section 1—

> That nothing in this act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers, for the exchange of services.

We call attention to rules of statutory construction which are cogent in determining the extent of the application of this proviso:

> The natural and appropriate office of the proviso being to restrain or qualify some preceding matter, it should be confined to what precedes it unless it clearly appears to have been intended to apply to some other matter.

(*Bank for Savings* v. *The Collector*, 3 Wall. 495; *Savings Bank* v. *United States*, 19 Wall. 227; *Commonwealth* v. *Kelley*, 177 Mass. 221, 58 N. E., 691.) It is to be construed in connection with the section of which it forms a part, and it is substantially an exception. If it be a proviso to a particular section it does not apply to others unless plainly intended. (*Sutherland Statutory Construction*, vol. 2, 2d ed. sec. 352.)

In *American Express Company* v. *United States* (212 U. S. 522, 534), this court speaking, through Mr. Justice Day, said:

> There is no doubt that a proviso has not infrequently been the means of introducing into a law independent legislation, notwithstanding it is the true office of a proviso to restrict the sense or make clear that which has gone before and which might be doubtful because of the generality of the language used. (*United States* v. *Dickson*, 15 Peter, 141, 163 * * *.)
>
> While, therefore, a proviso may sometimes be construed as extending rather than limiting legislation, each statute must depend upon its own terms, and a proviso will be given such construction as is consistent with the legislation under construction.

In *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Company* (204 U. S. 426, 442), this court, construing the ninth and twenty-second sections of the act to regulate commerce giving a shipper the right to bring suit in court to obtain a relief from an alleged

unreasonable freight rate, and speaking through Mr. Justice White, now the Chief Justice, said:

> True it is that the general terms of the section when taken alone might sanction such a conclusion, but, when the provision of that section is read in connection with the context of the act, and in the light of the considerations which we have enumerated, we think the broad construction contended for is not admissible. * * * . In other words, we think that it inevitably follows from the context of the act that the independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violations of the act, conferred by the ninth section must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the Commission, and, therefore, does not imply the power in a court to primarily hear complaints concerning wrongs of the character of the one here complained of.

In *Louisville & Nashville R. Co.* v. *Mottley* (219 U. S. 467, 475), this court, construing the words forbidding a carrier to receive "a greater or less *or different* compensation," speaking through Mr. Justice Harlan, said:

> We must have regard to all the words used by Congress, and, as far as possible, give effect to them. (*Market* v. *Hoffman*, 101 U. S. 112, 115.) * * *

and held that only money could be accepted in payment for transportation. In this the court

sustained the rulings of the Interstate Commerce Commission in that case.

In *Holy Trinity Church* v. *United States* (143 U. S. 457, 472), this court, passing upon a technical construction of a statute which if accepted would carry the act beyond its purpose, and speaking through Mr. Justice Brewer, said:

> It is the duty of the courts, under those circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore can not be within the statute.

Turning now to the proviso under consideration, we find it placed in section 1, which does not deal with the subjects of discrimination in charges or with uniform rates enforceable in all cases of public or commercial transportation. To give the effect contended for, namely, that telegraph companies may contract with railroad companies *for free transportation or transportation at less than the published rate*, the proviso must be carried over into and annul, as to these carriers, the provisions of sections 3, 6, and 15. There can be no question that the transportation of materials and men "off the line" of the railroad is public or commercial transportation as to which the law prohibits unjust discriminations and undue preferences, and enforces the application of the published rate by very severe penalties. Transmitting messages for the railroad company, off the line of the railroad is also public or com-

mercial service the rendering of which by the telegraph company must be without unjust discrimination or undue preference. Under the construction contended for by the railroad companies and the Western Union Telegraph Company, sections 3, 6, and 15 become absolutely inoperative as to these companies when either one is performing for the other purely public or commercial service. The railroad company may have all of its commercial telegraph business performed free or at less than the reasonable and usual charge made against other senders of messages. The telegraph company may ship its millions of poles and hundreds of carloads of material from one end of the country to the other (for similar contracts are made with all carriers) free of charge. The whole purpose of the act regulating public service is destroyed as to this public business by these carriers. Unjust discrimination and undue preference are carried to the fullest possible extent by their agreement and they are placed wholly outside of the regulating control of the statute. This free transportation, enormous in quantity, increases the operating expenses of the railroad company, which must be made up by increased charges to the public. It is no answer to this to say that the railroad company gets its telegraphing free and therefore saves that operating expense. There is no evidence to show that the services so exchanged are at all equal when measured by the public rates; if they are equal no loss is occasioned by exchanging services at the public rates. If the public transporta-

tion services do not equal the public telegraph service, measured by the public rates, or vice versa, then the public must make up the loss in higher rates, to enable the losing company to do this business.

Section 6 provides "the provisions of this section shall apply to all traffic, transportation, and facilities defined in the act." If Congress intended to exclude the railroad companies from the provisions of this act in their contract relations with the telegraph companies, the proviso in section 1 should have been placed immediately after this provision in section 6.

When we consider the words in the proviso they do not compel a construction that Congress intended that these companies could contract *as to the amount* of the rates or charges to be made by one to the other for public or commercial service; at most they permit an exchange of "public services" *measured by the public rates*, any balance to be paid, on settlement, by the debtor company.

In *Chicago, I. & L. R. Co.* v. *United States* (219 U. S. 486, 496) there was an agreement to exchange transportation for advertising at the regular rates, that is to say, transportation was to be at published rate and advertising at the regular rate charged other customers. This was an exchange of services at established rates, but this court following the *Mottley case*, speaking through Mr. Justice Harlan, said:

> The legislative department intended that all who obtain transportation on interstate

> lines should be treated alike in the matter of rates, and that all who availed themselves of the services of the railway company (with certain specified exceptions) should be on a plane of equality. Those ends can not be met otherwise than by requiring transportation to be paid for in money which has a certain value known to all and not in commodities or services or otherwise than in money.

If these companies had been permitted to contract for an exchange of services it would not follow that such a provision permitted them to exchange services on any other basis than the regular charges to all customers for the services rendered. Where the rates of common carriers are fixed by public authority and are payable in money, unless there be an exception in the legislation, it follows that if the proviso in section 1 be extended to public services, the right to contract for the exchange of services goes no further than allowing the companies to offset their accounts for services measured by the public rates, the company against whom the debit balance appears paying that amount in money to the other company. This is a change in the law as it stood when the act was passed—the law requiring *all* payments to be made in money.

While this proviso was not discussed in either House of Congress, having been inserted in conference, there was a debate on the question of permitting an exchange of transportation for adver-

tising. In the Congressional Record of April 29, 1910, (p. 5582), the following discussion appears.

Mr. Bartlett of Georgia offered an amendment providing in effect that common carriers might exchange transportation of passengers for advertising.

> Mr. HOBSON. The gentleman will notice that there is no authority vested in the Interstate Commerce Commission or in anyone else to fix the amount of transportation for a given amount of advertising.
>
> Mr. MANN. *It will be at the current rate.*
>
> Mr. HOBSON. That must open the door for railroads to give transportation where there is not necessarily any advertising value in return. [Applause.] And so we get right back to the old idea of an opportunity for the railroads to give favors. [Applause.] Will the gentleman tell me further whether he sees any way in which that could be regulated?
>
> Mr. BARTLETT of Georgia. I do not think this amendment authorizes that deduction to be drawn from it and I *do not think the railroads would or could, except in violation of the law, furnish transportation at a greater or less price than that fixed by the law or by the railroad commission.* [Italics ours.]

Mr. Mann was the chairman of the Committee on Interstate and Foreign Commerce of the House, well versed in the law, and all participating in the discussion understood the subject. It is very clear, therefore, that in discussing that proposed amendment for

"exchange of services," there was no thought that such a provision would give the parties the right to contract for less than the established rates for transportation and the current rates for advertising, although the latter might be difficult of ascertainment. This shows that the legislators in the House took the same view of the words "exchange of services" as applied to public services as the Commission did in its rulings. What we insist upon is that the language of the proviso, in view of the state of the law and controversies which had arisen, does not authorize the companies to contract in reference to the *amount* of their rates or charges for common carrier services, or for a *reduction* of the published railroad rates or the regular public telegraph rates, when exchanging common carrier services; but for all common carrier services the published and public rate must be charged by each company, respectively.

That the construction insisted upon by the railroads and the Western Union Telegraph Company results in unlawful discrimination between shippers and users of these services is apparent. The services are free up to a very large maximum in each case and one-half rates are to be charged above the maximum. No provision is made for measuring these services if the public rates are to be disregarded, and there is no way of ascertaining which of these companies is advantaged and to what extent. If the payment in the manner provided in the *Mottley* and the *Muncy* cases produced a discrimination between

those parties and the public that was required to pay money, certainly in these cases where the payment is in unmeasured services, there is a discrimination.

But it is said this construction is of advantage to the public because it furnishes cheap telegraphing to the railroads and cheap transportation to the telegraph companies. This argument could have been as well made in the *Fuel Coal* case where a lower rate had been put in for coal intended for railway consumption than was charged for commercial coal. This case had reference to off line service. In that case (*Int. Com. Com.* v. *Baltimore & Ohio R. Co.*, 225 U. S. 326, 342) this court, speaking through Mr. Justice McKenna, said:

> * * * Once depart from the clear directness of what relates to the carriage only and we may let in considerations which may become a cover for preferences. May a carrier look beyond the service it is called upon to render to the attitude and interest of the shippers before or their attitude and interest after transportation? It must be kept in mind that it is not the relation of one railroad to another with which we have any concern, *but the relation of a railroad to its patrons, who are entitled to equality of charges* * * *. [Italics ours.]

If railroads may not give to each other concessions from the public rates, on what theory or reason should telegraph companies and railroads dealing with each other be permitted to make varia-

tions in their rates for services when such charges are required by law to be the same to the public? If railroads must pay full transportation charges for off-line service on other roads, why should not a telegraph company pay the public rate? If a railroad must pay the public rate for public services by another railroad, why should it not pay the regular rate to the telegraph company? Of course, if the act of Congress compels such a conclusion we must yield, but where the language in the act, considering its location, its relation to the whole act, and its wording, does not compel such a conclusion, what reasons are there for the court to give it such effect by construction?

Section 22 expressly provides that nothing in the act shall prevent the carriage of property free or at reduced rates for the United States. But not a soldier is carried free and no one has contended that the United States was entitled by reason of that clause in the act to have its property carried free of charge and thereby cast the burden of that transportation upon the railroads and the public. Is a telegraph company to have greater privileges over the railway lines of the country than the United States Government, or rail carriers, or other shippers? We can see no reason for extending the effect of this proviso beyond the position which it occupies in the act or its wording entitles it to.

II.

If the proviso is limited to those services on the line which in their nature are private, is the act unconstitutional?

Justice Lynn of the Municipal Court of the City of New York in his opinion in *Postal Telegraph-Cable Company* v. *Tonopah and Tidewater Railroad Company*, No. 130, held, "that that provision of the interstate commerce act as construed by the Interstate Commerce Commission which prevents the rendering of the so-called free telegraph service by plaintiff to defendant in accordance with such contract is unconstitutional." This judgment was affirmed on the two appeals in the Supreme Court of New York. This opinion denies the constitutional right of Congress, in the exercise of its regulatory power, to "abrogate the so-called free telegraph service" provided for in the contract. This question has been determined by this court in so many cases that a reference to the decisions seems all that is necessary to show the error in the position taken by the court below in this case.

In the exercise of its power to regulate commerce and in the regulation thereof, existing contracts, perfectly lawful when made, may be suspended by the adoption of Federal law with which they are inconsistent. (*Louisville & Nashville R. Co.* v. *Mottley*, 219 U. S. 467; *New York, N. H. & H. R. R. Co.* v. *Int. Com. Com.*, 200 U. S. 361; *Armour Packing Co.* v. *United States*, 209 U. S. 56; *Chicago, B. & Q. R. Co.* v. *United States*, 209 U. S. 90; *Chicago, I. & L. Ry. Co.* v. *United States*, 219 U. S. 486; *New York Central & H. R. R. Co.* v. *Gray*, 239 U. S. 583; *O'Keefe* v. *United States et al.*, 240 U. S. 294; *Judge*

v. *Northern Pacific Ry. Co.*, 189 Fed. 1014; and *St. Louis, I. M. & S. Ry. Co.* v. *Conley*, 187 Fed. 949.)

In the *Mottley Case*, supra, Mr. Justice Harlan, speaking for the court, at page 474, said:

> It may be, as suggested, that a refusal to enforce the agreement of 1871 will operate as a great hardship upon the defendants in error. But that consideration can not control the determination of this controversy. Our duty is to ascertain the intention of Congress in passing the statute upon which the railroad company relies as prohibitive of the further enforcement of the agreement in suit.

In *Armour Packing Company* v. *United States* (209 U. S. 56, 82), this court, construing the effect of the act to regulate commerce upon an existing contract, speaking through Mr. Justice Day, said:

> But the right to make such regulations is inherent in the power of Congress to legislate respecting interstate commerce and such considerations of inconvenience or hardship address themselves to the lawmaking branch of the Government. * * *.
>
> It is the province of the judiciary to enforce laws constitutionally enacted, not to make them to suit their own views of propriety or justice.

Long before the above cases were decided it was said in *Legal Tender Cases* (12 Wall. 457, 551), that:

> As in a state of civil society property of a citizen or subject is ownership, subject to the lawful demands of the sovereign, so con-

> tracts must be understood as made in reference to the possible exercise of the rightful authority of the government, and no obligation of a contract can extend to the defeat of legitimate government authority.
>
> * * * A new tariff, an embargo, a draft, or a war may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless.

These cases, it seems to us, entirely dispose of the question and sustain the constitutionality of the law as construed by the Interstate Commerce Commission, although its ruling does abrogate that part of the contract which provides for free service off the line.

III.

Does the proviso in the antipass paragraph of section 1 of the act to regulate commerce, permitting the exchange of passes and franks, affect the construction given to the proviso authorizing contracts for the exchange of services?

We claim that the provision in the antipass paragraph of section 1 has no relation with the proviso authorizing contracts for the exchange of services between telegraph and railroad companies. There has always been a certain amount of free services in the carriage of persons by railroad and in the sending of messages by telegraph which has been and is regarded as proper in the conduct of the public service. There were great abuses in this branch of the service resulting in overburdening the railroads and the public. Congress, therefore, restricted the grant-

ing of passes to specified classes of persons. The act to regulate commerce prohibits free passes and free transportation to persons not included in the excepted classes enumerated in section 1. The classification includes persons engaged in charitable and eleemosynary work, indigent, and destitute persons, persons in charge of shipments of live animals, employees of the postal, customs, and immigration departments of the Government, and officers, agents, and employees of the carriers, and their families. Passes are classified into trip, monthly, and annual passes. The issuance of passes, within the classification, rests with the carrier, but does not extend beyond an annual pass under the custom. The carrier may abuse this privilege, but if the practice is confined to the sphere well established and well known to Congress, it is not likely to be carried to an unreasonable excess and is under control from year to year. This court, speaking upon the subject in the *Erie Pass case, supra*, page 272, said:

> Congress certainly had no such view and gave power to exchange passes, considering that the best safeguard against its abuse was the interest of the carriers. * * * It has its justification in a strictly business policy, and instead of being a burden upon the resources of the company, it is an aid to them.

When this privilege was extended to the giving of franks by the telegraph companies, it was undoubtedly understood that the issuance of franks was to be in conformity with the practice of the rail-

carriers in issuing passes, a privilege to be exercised freely in each case and not exceeding an annual or yearly frank.

Looking at the antipass provision therefore in the light of the history of the practice and the classification of passes, it is evident that nothing in this provision can justify an agreement for passes extending over a period of fifty or ninety-nine years. If the court were to sustain the contracts under consideration as valid contracts, because of the pass provision then the agreement to issue passes for fifty years or ninety-nine years would be an obligation that would bind not only the companies but their successors, and if the Government, for instance, should take over the telegraph lines and operate them under Government ownership, the provision in these contracts would be binding and could only be eliminated by condemnation. There is no evidence, or reason to believe, that Congress, in authorizing the issuance of passes and franks in the customary way, intended to authorize these companies to enter into contracts that should bind the companies to issue passes and franks to officers, employees, etc., of each company, respectively, for fifty or ninety-nine years.

This privilege of issuing passes and franks granted by the act must stand by itself and be considered as a grant to be exercised only in accordance with the prevailing custom, a custom which prevents abuses because of the interest of the carriers in the free exercise of the right to grant or refuse such passes at any time.

It may well be asked why Congress extended the privilege of granting passes and franks to these carriers, if under the proviso in controversy in this case they had the full right to grant free services under the contracts they were authorized to make. If, under that proviso, they have the right to give free public and commercial transportation and transmission to the officers, agents, and employees of the companies, they did not need an authority to give passes and franks. This tends to show that Congress understood that such right of contract for exchange of services did not include public or commercial transportation or transmission, and therefore the extension of the pass and frank privilege was necessary.

CONCLUSION.

Section 20 of the act to regulate commerce provides for annual reports by the carriers:

> Such annual reports shall show in detail * * * the earnings and receipts from each branch of business and from all sources; * * *; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet.

These annual reports give information upon which Congress may legislate and facts which the Commission may consider in determining rates. Under these contracts there is a very large volume of transportation for the telegraph companies and a very large volume of messages for the railroad companies,

which are public services by common carriers, the receipts from which are not now shown in the annual reports of these companies. The only way in which these revenues can appear is by exchanging the public services on the basis of the public rates; then the rates of the railroad companies for transportation would be included in their receipts and the amount received by the telegraph companies would be covered by their reports. The purpose of these reports, among other things, is to show total receipts at public rates for public services. The enforcement of the ruling of the Commission is the only way in which these facts as to this exchange business will be made to appear in the reports of total revenues.

Following the rule of construction heretofore adopted by this court and taking into consideration the purposes of the act to regulate commerce, the portion of the act in which the proviso in controversy is placed, and the strict wording of the proviso, we submit that the administrative ruling of the Commission should be sustained.

Respectfully submitted.

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